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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. ~~1963~~ 12

ANTHONY M. GROSSO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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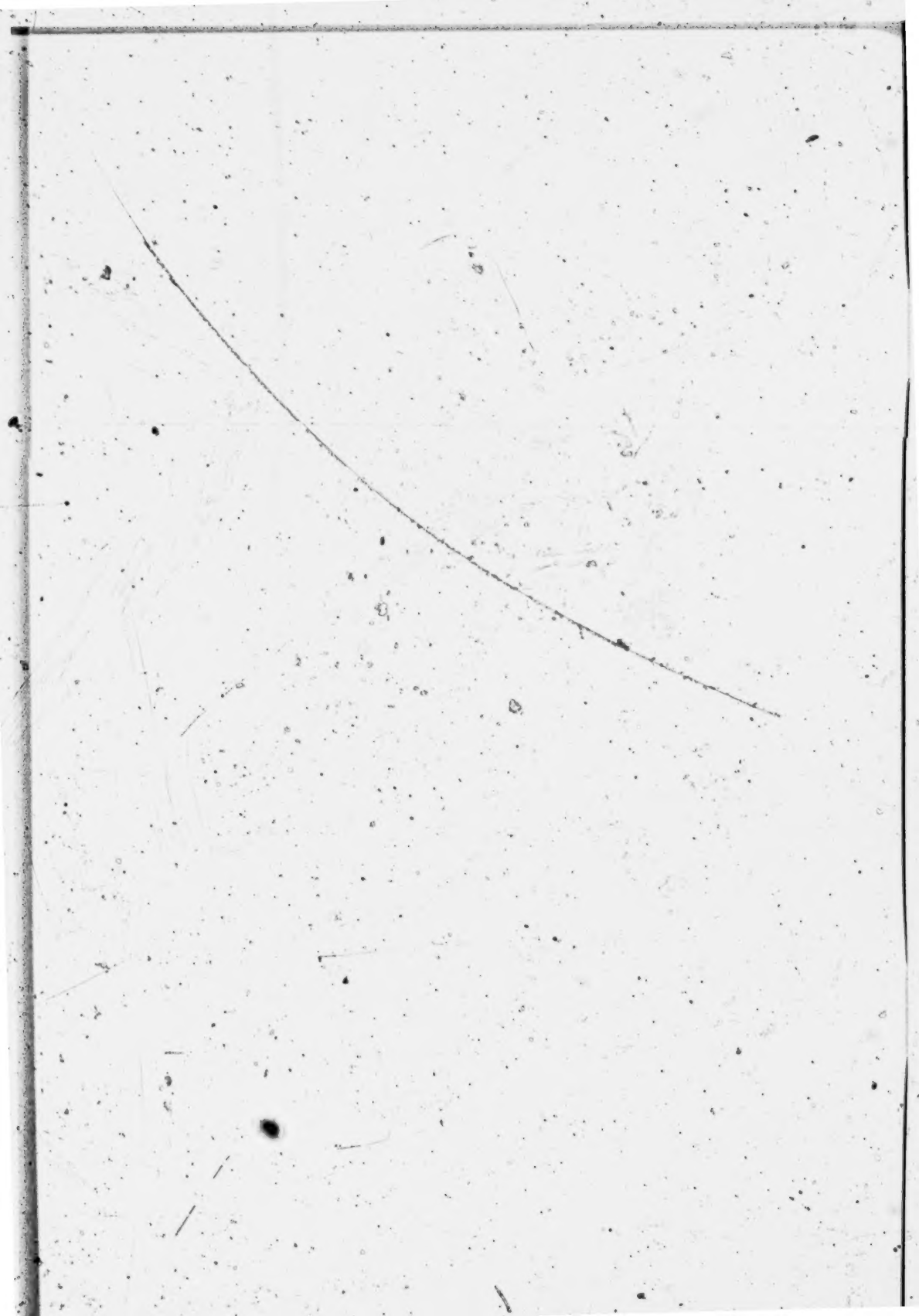

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ANTHONY M. GROSSO,

Petitioner,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 25, 1966.

CITATIONS TO OPINIONS BELOW

The district court's opinions denying a motion to suppress evidence (79a*) and a motion to dismiss the indictment (97a) are reported at 225 F. Supp. 161. No issue is raised here with regard to suppression of evi-

*This and similar references are to the Appendix printed for use of the court below, and made a part of the record here.

dence. The opinion on the motion to dismiss the indictment is printed in Appendix B hereto, at p. 17 below. The opinion of the court of appeals, printed in Appendix B hereto, at p. 51 below, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. A timely petition for rehearing was denied on May 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the excise tax on wagering imposed by 26 U.S.C. § 4401 violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment?

2. Can a criminal conviction stand where there were communications between the court and the jury during the jury deliberations in the absence of petitioner and his counsel and there has been no showing that these communications were not prejudicial to the petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are printed in Appendix A, at p. 14 below.

STATEMENT OF CASE

Petitioner was tried by a jury and convicted on fifteen counts involving failure to pay the excise tax on wagers required by 26 U.S.C. § 4401, on four counts of failure to pay the occupational tax on wagering required by 26 U.S.C. § 4411, and on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. He was fined $191,000—$1,000 on the conspiracy count and $10,000 on each of the wagering tax counts—and sentenced to one year in jail on each count, with the sentence on nine of the counts to be consecutive, and the sentences on the remaining counts concurrent with one of these nine. (386a) His motion to dismiss the excise tax and conspiracy counts of the indictment on the ground that payment in the required manner of the wagering excise tax called for by 26 U.S.C. § 4401 would violate his privilege against self-incrimination (29a) was denied. (99a) This constitutional objection was preserved at the trial (167a-171a) and raised again by motions for judgment of acquittal at the close of the government's evidence (236a-329a) again at the close of all the testimony (T. 2219) and after verdict. (371a-373a)

The issues in this case were submitted to the jury at 4:15 p.m. on Wednesday, March 4, 1964. (381a) The jury deliberated until about 11:00 p.m. that night, and resumed deliberation the following morning. (381a) At 12:15 that afternoon counsel for petitioner was informed by the United States Attorney that at approximately 11:30 a.m. the jury had sent a note to the judge indicating they could not agree, and the court had instructed the jury, through the bailiff, to continue deliberating. (381a) Neither petitioner nor his lawyer were present

when the note was received and the instruction given, and neither the note nor the court's reply were given to the clerk or otherwise made a matter of record. (365a; 381a-382a) The jury continued to deliberate until about 11:00 p.m. that night. (324a)

As the jury was preparing to return to its hotel on that Thursday night, one of the jurors became ill. (324a) Because of her illness the jury was confined to the hotel, and did not resume deliberations until 2:50 p.m. on Saturday, March 7. (383a) Shortly before 3:15 p.m. the jury sent another note saying that they were deadlocked without hope and felt it useless to deliberate any further. (345a) This note was received by the court during a conference at which petitioner and his counsel were present. (346a) Counsel renewed earlier motions (322a; 337a) for a mis-trial (346a), but the court instead said to the bailiff: "Tell them I have got their message and I suggest they keep on working." (346a) At 8:20 p.m. Saturday the jury returned the verdict in the case. (347a) The communication between court and jury was assigned as a ground for a new trial in a motion filed on Tuesday, March 10. (376a) The motion for a new trial was denied. (369a) Appeal was taken and the conviction was affirmed by the court of appeals.

REASONS FOR GRANTING THE WRIT

1. *The self-incrimination issue raised in Question One is an important question of constitutional law which has never been decided by this Court.* This Court has twice held, in *United States v. Kahriger,* 345 U.S. 22 (1953), and in *Lewis v. United States,* 348 U.S. 419 (1955), that the $50 occupational tax on wagering, imposed by what is now 26 U.S.C. § 4411, is constitutional, as against objection based on the privilege against self-incrimination. Whether those decisions can stand in the light of the unanimous decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), is itself an important question which the Court has recently agreed to review. *Costello v. United States,* 86 S. Ct. 1195 (1966). This case differs in an important aspect from *Kahriger, Lewis,* and *Costello* because here the challenge is to the constitutionality of the 10% excise tax on wagers, imposed by 26 U.S.C. § 4401, while only the occupational tax was involved in the three cases named. The basis of decision in *Kahriger* was that the privilege of self-incrimination "has relation only to past acts, not to future acts that may or may not be committed." 345 U.S. at 32. By the occupational tax provisions, the Court there held, "appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." *Id.* at 32-33. Again in *Lewis* the occupational tax was said to be "a registration fee that must be paid before engaging in the business of wagering." 348 U.S. at 422.

But this feature, which was thought to save the occupational tax, is of no help with regard to the excise

tax. The excise tax is payable only on wagers which have, in the month covered by the return, actually been placed with the taxpayer. 26 U.S.C. § 4401(c); Treas. Reg. § 44.6011(a)-1(a). Payment of the excise tax is an admission by the taxpayer that he has engaged in the past month in wagering. Such an admission is "a link in the chain," *Hoffman v. United States,* 341 U.S. 479, 486 (1951), and a robust one, of the evidence needed to prosecute the taxpayer for both federal and state crimes. Payment of the excise tax would amount to a confession that the taxpayer has engaged in the business of wagering, though he has not paid the occupational tax required by 26 U.S.C. § 4411, and would incriminate him of failure to pay the occupational tax. It might well also incriminate him under the racketeering statute, 18 U.S.C. § 1952. Cf. *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964). Payment of the excise tax would incriminate the taxpayer for violation of the Pennsylvania statutes against lotteries and gambling. 18 Pa. St. §§ 4601, 4603.

The distinction between past conduct and future conduct was relied on by the Ninth and Seventh Circuits to distinguish *Kahriger* and *Lewis,* and to hold unconstitutional 26 U.S.C. § 5841, which requires registration of firearms obtained without complying with other provisions of the National Firearms Act. *Russell v. United States,* 306 F.2d 402, 410 (9th Cir. 1962); *Dugan v. United States,* 341 F.2d 85 (7th Cir. 1965). That same distinction applies here. Because of that distinction, this is a different case from *Kahriger, Lewis,* and *Costello,* and it is more difficult case in which to sustain the law against Fifth Amendment Challenge.

Nor is this case controlled by *United States v. Sullivan,* 274 U.S. 259 (1927). What the Court said in distin-

guishing *Sullivan* in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965), is apposite here: "In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." Further Sullivan could have reported his income, but claimed his privilege with regard to its source. Petitioner could not have paid the excise tax without admitting a violation of federal and state law. See *Russell v. United States,* 306 F.2d 402, 409 (9th Cir. 1962).

To hold that a person may not be required to incriminate himself by payment of the excise tax would not have a destructive effect on the fisc. If Congress is really interested in the revenues produced by the taxes on wagering—and it is on this basis alone that it has power to impose these levies, as *Kahriger* holds—it has ample power to provide immunity for taxpayers. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964). It has chosen, instead, expressly to deny any immunity to persons paying these taxes. 26 U.S.C. § 4422. If the result, then, is that the constitutional privilege makes the tax unenforceable except where gambling is not unlawful, the fault lies not with the Constitution but with Congress.

The constitutional issue posed by Question One is important and difficult. It has never been decided by this

Court. Though it is related to the issue raised in *Costello,* it is not the same issue, and it would be quite possible to find the excise tax provision here in question unconstitutional though the occupational tax involved in *Costello* be upheld.

2. *The decision below on the jury-trial issue raised by Question Two conflicts with decisions of this Court* and of other courts of appeals. It is settled law that no communication may take place between the court and the jury in the absence of the defendant. *Mattox v. United States,* 146 U.S. 140 (1892); *Lewis v. United States,* 146 U.S. 370 (1892); *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76 (1919); *Shields v. United States,* 273 U.S. 583 (1927); Fed. R. Crim. Proc. 43. In the present case a criminal conviction has been allowed to stand by the court below although the trial court received a communication from the jury, the exact contents of which are unknown, in the absence of both petitioner and his counsel, and the bailiff, on instructions from the court, gave the jury a message from the court, the contents of which are entirely unknown, in the absence of both petitioner and his counsel. The court below, in reaching this remarkable result, did not dispute the principle of law stated at the outset of this paragraph. Indeed it twice referred to the conduct of the trial court in this respect as "obvious error." Nevertheless it found that such error did not require reversal "in the absence of prejudice to the substantial rights of the appellant." Since "the evidence as to the appellant's guilt was overwhelming and * * * there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict, "reversal was held not warranted. In so ruling, the court of appeals committed "obvious error."

The court of appeals appears to rest its holding in part on the failure of petitioner to object to the communication between court and jury. But petitioner and his counsel did not know of the communication until after it was over, and the damage fully done. The first case which the court below cites as to the requirement of an objection, *United States v. Woodner,* 317 F.2d 649, 651 (2d Cir. 1963), says objections "must ordinarily be raised while there is still time to rectify the asserted error." Similarly Rule 51 of the Rules of Criminal Procedure, though ordinarily calling for objection "at the time the ruling or order of the court is made or sought," goes on to say that "if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

The case cannot turn on the absence of an objection which would have served no useful purpose. The real issue is in what circumstances communications with the jury in the absence of a defendant require reversal. A few cases seem to regard this as so serious a deviation from constitutional norms as to require reversal in every case without any showing of prejudice. In *Shields v. United States,* 273 U.S. 583 (1927), this Court reversed where there had been an exchange of notes, the contents of which were a matter of record, without any mention of whether defendant was prejudiced, and expressly refrained from passing on another ground of error asserted by the defendant that the judge's note in reply was in error. The Third Circuit itself, in a civil case, *Arrington v. Robertson,* 114 F.2d 821, 823 (3d Cir. 1940), said, through Marris, J., that for the judge to send written instructions to the jury in the absence of defendant or his counsel "was the denial of a right so fundamental

as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given." See also *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960), where there was reversal though on the facts defendant could not possibly have been prejudiced and his attorney said affirmatively he was satisfied with what the court had done.

At the other extreme would be a rule that communications outside the presence of the defendant require reversal only if defendant can demonstrate prejudice. This seems to have been the view of the court below. It may well be the rule applied in *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir. 1963). If so, the *Woodner* case stood alone, prior to the present decision.

The rule adopted in the vast majority of cases takes a middle position. It provides that there must be reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. *Mattox v. United States,* 146 U.S. 140, 150 (1892); *Walker v. United States,* 322 F.2d 434, 436 (D.C. Cir. 1963); *United States v. Compagna,* 146 F.2d 524, 528 (2d Cir. 1944); *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964); *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966); *Wheaton v. United States,* 133 F.2d 522, 527 (8th Cir. 1943); *Ray v. United States,* 114 F.2d 508, 513 (8th Cir. 1940); *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937); *Jones v. United States,* 299 F.2d 661, 662 (10th Cir. 1962); *Little v. United States,* 73 F.2d 861, 865-867 (10th Cir. 1934); *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

By departing from the salutary rule of the cases from this Court and six other circuits last cited, the

court below has diluted the protection which the law has always given criminal defendants. Before sending a man to jail for nine years and fining him $191,000 after a trial in which there was "obvious error" of constitutional dimension, it is not too much to require the government to demonstrate that he has not been harmed by the error. To transfer the burden to defendant, and to require him "to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible." *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

Nor can it be said that the court below did make an affirmative finding of no prejudice, and that its language was simply unartistic. It found that there was no reasonable likelihood that petitioner was harmed because it deemed the evidence of his guilt to be "overwhelming." But "it is not the appellate court's function to determine guilt or innocence." *Kotteakos v. United States,* 328 U.S. 750, 763 (1946). Plainly the evidence did not seem so overwhelming to the jury, which twice reported its inability to agree on a verdict. On this record, neither the court below nor any other can possibly say whether the private communications were prejudicial, because no one knows what they were. It was the recollection of the trial court that the note it received from the jury in the absence of defendant "was at least in substance the same" (365a) as the second note, which is a matter of record. (345a) But the notes may well have been the same in substance, while differing in such a detail as, for example, indicating the numerical division of the jury. See *Mullin v. United States,* 356 F.2d 368 (D.C. Cir. 1966). Presumably, as reported to defense counsel by the United States Attorney, the court, on receipt of the

first note, instructed the bailiff to tell the jury to continue deliberating. But the record is completely silent as to what the bailiff told the jury. "The jury received an instruction second hand, and not by the judge. Chances for error are too great." *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937). For all the record shows, or any party to this litigation knows, the bailiff may have given the jury his own version of the *Allen* charge. He may have told the jury, "You have got to reach a decision in this case." Cf. *Jenkins v. United States,* 380 U.S. 445 (1965). These are not imaginary horribles. See *Wheaton v. United States,* 133 F.2d 522 (8th Cir. 1943), where, in response to a note from the jury saying they were hopelessly deadlocked, the judge sent the bailiff back with the message he would not excuse them, but the bailiff stayed on in the jury room for some time explaining how they could vote separately on different counts. "In the case at bar, the record is silent as to what occurred in the jury room. There is nothing therefore in this record to support a finding, affirmatively made in the cited cases, that the error was necessarily harmless." *Little v. United States,* (10th Cir. 1934).

The rule that all communications between the court and the jury should be in open court, in the presence of the defendant and his counsel, is no Eighteenth Century strait-jacket. It is a rule of great worth to those charged with crime. Departures from the rule should not be ignored save on the clearest showing that the violation was technical only, and not prejudicial to the defendant. This Court should review this case in order to prevent dilution of that rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V. No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code, title 26, section 4401:

(a) Wagers. There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

United States Code, title 26, section 4422: The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

United States Code, title 26, section 6107: In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for

each 100 words or fraction thereof in the copy or copies so requested may be charged.

Treasury Regulations § 44.6011(a)-1(a): Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

Federal Rules of Criminal Procedure, Rule 43: The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

Federal Rules of Criminal Procedure, Rule 51: Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Opinion of the District Court on Motion to Dismiss Indictment

WALLACE S. GOURLEY, *Chief Judge.*

This criminal proceeding presents, through a Motion to Suppress Evidence, many of the complex and intricate questions which arise in law enforcement as to the interpretation of the Constitutions of the United States and Pennsylvania as the provisions thereof relate to arrest, search of premises, and seizure of evidence.

The proceeding also brings into clear focus the problems that law enforcement officers have in bringing to the bar of justice those persons who it is believed are the heads or in control of, directly or indirectly, syndicated lottery or gambling operations.

On one side of the scales or account of justice, the ledger entries show the all-consuming amount of time, effort and dedication to duty involved in the close and careful supervision and investigation of a syndicated lottery operation, the lack of legal training and education of the law enforcement officers, and the lack of close or proper liaison relationship between police officers who enforce the law on the one hand, and the directors of said officers or their supervisors and the legal staff commonly identified as the prosecuting attorney or district attorney's office which does not have the time or opportunity to confer and/or consult with an officer before an arrest is made. On the other side of the ledger are the provisions of the Constitutions of our states, more

particularly Pennsylvania in this proceeding, the Constitution of the United States of America, and the requirements which our founding fathers enunciated as to the protection and rights which a resident of this great country should be afforded when accused or required to appear in a Court of the state or the United States to answer charges as to conduct which has been prohibited or made unlawful either by state or federal law.

The Court has reviewed most carefully and meticulously all of the evidence, documentary and oral in nature, has studied and evaluated all authorities cited by the United States of America and the defendants, has made its own independent research, and I must conclude that although the matters involved in the Motion to Suppress are in the "twilight zone" of what is proper or improper, reflected judgment requires the conclusion that the arrests and the evidence secured in the searches and seizures incident to the arrests is, in each instance, sustainable and the Motion to Suppress, in each instance, will be denied.

My mind can reach no other conclusion and I believe if the writers of our Constitution had the facts which exist in this case before them, the Constitution would state that "the provisions of the Constitution shall not be interpreted to mean that the arrests and evidence secured incident thereto are improper or violative of the Constitution which is this day written."

The evidence which is subject to the Motion to Suppress arises out of two raids by state officers, one of which will be identified as the Jefferson Raid, and the other as the Bethel Park Raid. While each raid naturally involves a different factual situation, many of the constitutional and legal questions which are posed have

application to each of the two separate and distinct searches and seizures, the legality of which is now before the Court. However, a legal question is presented in the Bethel Park Raid which is not posed in the Jefferson Raid.

A. *Jefferson Raid—*

Members of the Racket Squad of the City of Pittsburgh had, for some time prior to said raid, been conducting a very extensive and thorough investigation of racket and gambling activity in and around Pittsburgh and Allegheny County, Pennsylvania. On the day of the raid, an experienced member of the Racket Squad, Flynn, who had personally participated in much of the investigation, obtained a search warrant from a Pittsburgh Alderman for the Lovejoy home in Jefferson Borough.

The knowledge which Flynn had as to violations of the state lottery laws, the specific details of the surveillance, and the facts revealed by the surveillance and investigation were stated in the presence of the Alderman while both were participating in a conference in the office of the Director of Public Safety, an official by whom the Alderman was employed as Chief Clerk. Later that day, the same officer appeared before the Alderman in his office in the City of Pittsburgh and signed informations, under oath, charging the commission of the crimes of operating a lottery and conspiracy to operate and maintain a lottery. Each of the informations was in conclusionary terms. The wording of each of them was in the language of the state wagering statutes and did not set forth any facts as to what the officer swearing out the information had seen, heard, observed or even been told by others. The only facts given or statements made to the Alderman under oath were those which were

contained within the information itself. Any facts given or statements made orally to the Alderman or in his presence were not made while Officer Flynn or anyone else was under oath.

B. *Bethel Park Raid—*

Search and arrest warrants were issued by a magistrate for the premises raided and for some of the persons arrested therein. The factual background of this raid is similar to that of the Jefferson Borough Raid in that the only statements made or facts given while under oath before the Justice of the Peace who issued the warrants were those contained in the information sworn to by Leo Flynn who, by this time, was a private citizen and no longer a Pittsburgh Police Officer.

The Justice of the Peace was not told, under oath, orally or in writing, any of the facts of gambling activity by the persons present at the raided premises and arrested therein personally known, or of which trustworthy information had been received, by Mr. Flynn or by William Claney Smith, Esq., an Assistant District Attorney for the County of Allegheny who had, by accident, discovered what has been described as the wagering headquarters allegedly being operated by or for some or all of the defendants in this proceeding.[1]

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1. The evidence of the police officers in this proceeding indicates that the wagering headquarters was moved daily, and that discovery of it, therefore, to a great extent, depended on someone cognizant of the wagering activities and of the people known to be active participants at the higher levels, seeing such a person at a time when the people so involved usually congregate to collect and tabulate the wagers and managing to follow such person to the meeting place.

Appendix B.

To facilitate the obtaining of a full, complete and intelligible understanding of the conclusions reached by the Court as to the complex and interrelated legal and factual issues involved in the proceeding, the Court will first discuss the general principles of the law of searches and seizures, and then, as to each issue raised by the facts, will discuss the factual background and the applicable principles of law.

Of the five primary legal questions posed by the factual background of the raids, four are posed in the Jefferson and the Bethel Park Raids, and the fifth is raised solely by the factual background of the Bethel Park Raid and is not posed in the Jefferson Raid.

GENERAL PRINCIPLES OF LAW

Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendants' immunity from unreasonable search and seizure under the Fourth Amendment is inadmissible in a federal criminal trial. Elkins v. United States, 364 U. S. 206 (1960). However, federal statutory standards are not applicable unless the search and seizure can be deemed to be a federal or a joint federal and state, rather than a state, search and seizure. See Byars v. United States, 273 U. S. 28 (1927).

While the Fourth Amendment to the Constitution of the United States ordinarily prohibits searches of premises without search warrants, a reasonable search of premises may be conducted without a search warrant where such search is incident to a valid arrest. See Ker v. California, 374 U. S. 23 (1963); United States v. Rabinowitz, 339 U. S. 56 (1950). An arrest warrant is not

necessarily required for a valid arrest to be made. The validity of an arrest without a warrant is determined by state law so long as such state law meets federal constitutional standards. See Ker v. California, supra.

To meet said standards the lawfulness of the arrest without warrant must, in turn, have been based upon probable cause, which exists where the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Ker v. California, supra.

The reasonableness of the resulting search and seizure incident to an arrest lawful under state law is determined by federal constitutional standards.[2]

I. WERE THE WARRANTS ISSUED VALID?

The answer is "no".

Law

Article 1, Section 3, of the Constitution of Pennsylvania provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without

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2. No contention has been raised by defendants that the searches and seizures subsequent to the arrests were unreasonable in that the area of the search and seizure was too extensive under the circumstances. Nevertheless, the Court has thoroughly reviewed the record and is satisfied that the search and seizure in both of the raids was reasonable under all the circumstances.

describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

The Fourth Amendment of the Constitution of the United States[3] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment has been construed to require that affidavits for the issuance of search and arrest warrants must state sufficient facts to permit the impartial Commissioner or issuing magistrate to determine whether probable cause exists. Nathanson v. United States, 290 U. S. 41 (1933); see Jones v. United States, 362 U. S. 257 (1960); Giordenello v. United States, 357 U. S. 480 (1958).[4] This is true whether the prosecution be a state or federal one.

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3. Whether the Fourth Amendment is applicable in this proceeding because this is a federal prosecution or because the Fourth Amendment is applicable to the activities of state officers through the Fourteenth Amendment, Mapp v. Ohio, 367 U. S. 643 (1961), or for both reasons, the Court will not attempt to determine, since it is clear that, in either case, the requirements of the Fourth Amendment are applicable to this proceeding and are so conceded to be by both parties.

4. The Supreme Court does not appear to have determined whether the Fourth Amendment requires a written affidavit, under oath. Since, however, no facts

Discussion

It appears to the Court that the facts contained in the sworn written informations[5] upon which the warrants were issued are insufficient to enable a magistrate to find the probable cause prerequisite to issuance of a warrant under the Fourth Amendment. The informations are in conclusionary terms, taken from the language of the Pennsylvania lottery statutes.

Some contention has been made that while the information may be in conclusionary terms, nevertheless the language used also constitutes a statement of facts. Even if this premise be accepted, the statements contained therein do contain sufficient facts to enable a magistrate to find probable cause.[6] See Giordenello v. United

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were given or statements made, under oath, except those contained in the written information, the Court need not determine that issue in this proceeding.

5. While an affidavit as such was not made out prior to the issuance of the warrants for the raids, the Court sees no reason why the information sworn to in each case by Leo Flynn could not serve as the affidavit on which the issuing magistrate would issue the warrants.

6. Defendants also contend that the warrants in the Jefferson Raid were invalidly issued since they were not issued by a neutral and detached magistrate in that the issuing magistrate was regularly employed as Chief Clerk of the Pittsburgh Department of Public Safety, whose officials sought the warrants for the raid, and the magistrate had been consulted about the raid during the course of his duties at the Department. Since the Court has determined that the informations for both of the raids are insufficient on their face, determination of these contentions of defendants is unnecessary and the Court

States, 357 U. S. 480 (1958); Nathanson v. United States, 290 U. S. 41 (1933); Byars v. United States, 273 U. S. 28 (1927).[7]

Whatever may be the requirements of the Pennsylvania Constitutional provision insofar as requiring that the oath or affirmation be in writing, since in neither of the two raids was anything said under oath other than what was stated in the formal information, any discussion or determination of this question would be superfluous and unnecessary. Furthermore, since it seems quite clear to the Court that the issuance of both the search and arrest warrants did not meet Fourth Amendment standards, the Court will not attempt to determine whether or not Article 1, Section 8, of the Pennsylvania Constitution applies to the issuance of arrest warrants as well as search warrants, a question which appears not to have yet been determined by any Pennsylvania appellate court,[8] nor will the Court measure the sufficiency of the facts stated in the informations against the requirements of the Pennsylvania Constitution for the issuance of a warrant.

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intends to express no indication of its opinion of this contention.

7. The Fourth Amendment requirement of probable cause, applied in Byars and Nathanson to search warrants, is likewise applicable to arrest warrants. Giordenello v. United States, 357 U. S. 480, 485-86 (1958).

8. A Pennsylvania trial court construed Art. I, § 8, as applicable to arrest warrants as well as to search warrants, and interpreted said provision as requiring a written oath or affirmation. See Kessler v. Hoffman, 9 District 365 (Berks Common Pleas 1899).

Accordingly, the Court holds that the warrants issued for both the Jefferson and the Bethel Park Raids were defective because the sworn informations supporting the issuance of the warrants failed to meet the requirements of the Fourth Amendment in that they did not state sufficient facts to permit a finding by an impartial magistrate that probable cause existed for the issuance of the warrants. Therefore, the search and seizure cannot be justified as being pursuant to a valid search warrant or as incident to an arrest pursuant to a valid arrest warrant.[9]

II. DOES THE INVALIDITY OF THE WARRANTS RENDER THE ENTRY AND SEARCH AND SEIZURE UNLAWFUL, EVEN IF THERE WOULD HAVE BEEN A VALID BASIS FOR ENTRY AND SEARCH AND SEIZURE WITHOUT WARRANT?

The answer is "no".

Discussion

Defendants rely principally on United States v. Merritt, 293 F. 2d 742 (3rd Cir. 1961), wherein entry under authority of a validly issued federal search warrant was held unlawful because not served in the daytime and an attempt to validate the search and seizure as incident to an arrest based on the officers' post-entry observation of defendant committing a felony in their presence failed.

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9. Some confusion exists as to whether or not an arrest warrant was ever procured for the Jefferson Raid. The Court finds that while the state officers did go to the Lovejoy home in Jefferson Borough intending to arrest as well as to search, they did not procure an arrest warrant.

The Court believes that Merritt is distinguishable from this proceeding on the facts, and that it is not authority for a proposition of law different from that which the Court deems controlling here—the intent of officers to rely on invalid warrants does not defeat the right of the Government to demonstrate that no warrant was necessary in order to make the arrest and the resulting search and seizure. See United States v. Rabinowitz, 339 U. S. 56, 60 (1950) (alternative holding); Stallings v. Splain, 253 U. S. 339 (1920); DiBella v. United States, 284 F. 2d 897 (2d Cir. 1960), vacated, 369 U. S. 121 (1962); Williams v. United States, 273 F. 2d 781 (9th Cir. 1959), cert. denied, 362 U. S. 951 (1960); United States v. Russian, 192 F. Supp. 183 (D. Conn. 1961); Compare Jones v. United States, 357 U. S. 493 (1958); Giordenello v. United States, 357 U. S. 480 (1958).[10]

Nowhere in the Merritt opinion is there any statement or suggestion that if entry was under an invalid warrant, an arrest which could legally be made without a warrant is rendered invalid solely because an attempt was made to enter under a warrant which was later declared invalid.

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10. The officers must, of course, have entered with an intent to arrest, an intent which they clearly had in both of the raids involved in this proceeding, and the arrest must have either preceded the search or, possibly, have occurred contemporaneously with the search. Since in both of the raids involved in this proceeding the arrests preceded the searches, no problem is presented as to whether a search occurring contemporaneously with the arrest meets the standards of the Fourth Amendment.

Appendix B.

The Government, in Merritt, apparently attempted to justify the search on the theory, *inter alia,* that the officers entered with a view to interrogation and investigation and that an arrest did not occur until after they entered the premises and saw defendant therein committing a felony in their presence. The Government did not attempt to argue that the entry into the premises to arrest was based on probable cause to arrest without a warrant. This question not having been raised in the Court of Appeals[11] and, accordingly, of course, not having been determined, and Merritt, therefore, being distinguishable from this proceeding and not governing the result to be reached,[12] the Court holds that the intent of the officers to rely on warrants which were later declared invalid does not defeat the right of the Government to demonstrate that no warrant was necessary to make the arrest and that the resulting search and seizure was lawful as incident to a lawful arrest.

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11. An examination of the file in the Merritt case while it was still in the United States District Court for the Western District of Pennsylvania, of the briefs and the transcript of the arguments before the Court, indicates that the government there did not raise the alternative argument which it is raising here.

12. Defendants also rely on Commonwealth v. Troup, 302 Pa. 246 (1931). The arguments pertaining to Merritt are equally applicable to Troup. The Court was not called upon to consider any alternative arguments and did not do so.

III. WERE THE SEARCHES AND SEIZURES LAWFUL AS INCIDENT TO A LAWFUL ARREST WITHOUT WARRANT?

The answer is "yes".

A. *May police officers under the law of Pennsylvania arrest without a warrant for a misdemeanor when said misdemeanor is not committed in their presence?*

The answer is "yes".

Law

The government concedes that under the law of Pennsylvania[13] a peace officer ordinarily may arrest for a misdemeanor without a warrant only when said misdemeanor is committed in his presence.[14] However, the government contends that as to that class of offenses relating to the setting up of gaming devices or machines, the Legislature of Pennsylvania, by statutory enactment, Act of March 31, 1860, P. L. 382, §60, 18 Pa. Stat. Ann. § 1445 (hereinafter sometimes referred to simply as 18 Pa. Stat. Ann. § 1445, § 1445 or 1445) has broadened the power of the peace officers to arrest without a warrant.[15] 18 Pa. Stat. Ann. § 1445 provides, *inter alia*:

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13. Whether an arrest is valid is governed by state law so long as such law meets federal constitutional standards. See discussion in section entitled "General Principles of Law" *supra*.

14. The record is bare of any evidence that the arresting officers saw a misdemeanor being committed in their presence.

15. The Act of March 31, 1860, P. L. 382, is entitled, "An Act To Consolidate, Revise, and Amend the Penal Laws of this Commonwealth."

"It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, character or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same."

This statute has been held to apply to the operation of numbers lotteries, Commonwealth ex rel. DiDio v. Baldi, 176 Pa. Super. 119 (1954); Commonwealth v. Bruno, 176 Pa. Super. 115 (1954), and would clearly be applicable to the seizure of the type of numbers paraphernalia involved in this proceeding.[16]

§ 1445 does not purport to indicate that the right to arrest is limited to an offense committed in the view of the officer and the Court does not so read said statutory provision.[17] Accordingly, under Pennsylvania law, by virtue of § 1445, an arrest without warrant of any person operating a numbers lottery is valid even though not committed in the view or presence of the arresting officer, and the arrests in question were certainly arrests for operating a numbers lottery.

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16. The contention of defendants that § 1445 is inapplicable to the arrests in question in that it is essentially a provision for civil forfeiture proceedings of gambling paraphernalia is without merit.

17. The research of counsel for the parties and the independent research of the Court has revealed no Pennsylvania appellate court cases which have determined this issue. A Pennsylvania trial court has taken a view contrary to that reached by the Court. See Commonwealth v. Battipaglia, 19 Camb. L. J. 30 (Philadelphia Quarter Sessions 1953).

However, defendants contend that § 1445 has been repealed by the Act of June 24, 1939, P. L. 872, § 1201, 18 Pa. Stat. Ann. § 5201 (hereinafter sometimes referred to as § 5201 or 5201), which provides, *inter alia*:[18]

> "The following acts and parts of acts, and their amendments, are hereby repealed absolutely, except insofar as the same * * * (d) relate to search and seizure * * *: * * * The act, approved the thirty-first day of March, one thousand eight hundred sixty (Pamphlet Laws, three hundred eighty-two), entitled "An Act to Consolidate, Revise and Amend the Penal Laws of this Commonwealth."

Since § 1445 is § 60 of said Act, it would ordinarily have been repealed by the enactment of § 5201. However, the government contends that § 1445 has been saved from repeal by the exceptions from repeal contained with § 5201.

The Pennsylvania courts have determined that the search and seizure provisions of § 1445 were not repealed by § 5201. Commonwealth v. Bruno, 176 Pa. Super. 115 (1954); Schuettler v. Maurer, 159 Pa. Super. 110 (1946); Petition of Potter Title and Trust Company, 157 Pa. Super. 254 (1945). Since, however, no Pennsylvania appellate court has specifically decided the question of whether or not § 5201 repealed the arrest provisions of § 1445, the question facing the Court is one of first impression which the Court must decide as it believes the appellate courts of Pennsylvania would decide the issue

18. The Act of June 24, 1939, P. L. 872, § 1201, 18 Pa. Stat. Ann. § 5201, is entitled, "An Act to consolidate, amend and revise the penal laws of the Commonwealth."

were it facing them. See Cerr v. Emrick, 283 F. 2d 293 (3rd Cir. 1960); Eckman v. Baker, 224 F. 2d 954 (3rd Cir. 1955).[19]

In the opinion of the Court, § 5201 did not repeal the arrest provisions of § 1445. As the Court reads § 5201, when it speaks of repealing certain acts, except insofar as the "same relate to search and seizure," "same relate to search and seizure" and only refer to an act or a section or a subsection thereof, whichever may be the applicable unit, as a whole and not to a portion thereof. Search and seizure provisions and the arrest provisions on which the government relies are contained in the same sentence of, obviously, the same section, § 1445.

Based on my legislative experience, having been a member of the Senate of Pennsylvania during the years 1942 through 1945, I cannot conceive that the Legislature of Pennsylvania intended to repeal part of § 1445 while retaining the remaining portions thereof. The Court reads § 5201 as saving all portions of any section which relate to searches and seizures. § 1445 is such a section and accordingly has not been repealed by § 5201.

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19. The same Pennsylvania trial court which held that the offense must have been committed within the view of the arresting office for an arrest to be legal under § 1445 has also held that § 1445 was not repealed by § 5201. See Commonwealth v. Battipaglia, *supra* note 17.

Appendix B.

B. *Does an arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer meet federal constitutional standards?*

The answer is "yes".

Discussion

Defendants contend that to allow an arrest without warrant for a misdemeanor not committed in view of the arresting officer creates doubt as to the constitutionality of § 1445 in that § 1445 would then be legalizing a search and seizure without warrant solely by what the search turns up. This contention is without merit. § 1445 must be read as authorizing an arrest without warrant only when the arrest is based on probable cause to believe that an offense has been or is being committed. When so based on probable cause, the arrest is legal when made and is not legalized, as defendants contend, by what evidence a subsequent search reveals. As so interpreted, 18 Pa. Stat. Ann. § 1445 clearly meets federal constitutional standards.

C. *Was the search and seizure preceded by the arrest and did the arresting officers enter with the purpose of arrest?*

The answer to both questions is "yes".

Discussion

The Court finds as a fact that the arrest in each of the two raids occurred immediately upon the entrance of the officers into the home, the searches and seizures occurred subsequent to the arrests, and the officers entered each of the homes in order to arrest.

D. *Did the arresting officers have probable cause to believe that an offense had been or was being committed?*

The answer is "yes".

Discussion

Since no contention has been made by the defendants in their brief that the arresting officers did not have probable cause to arrest without warrants, a simple finding that the arresting officers did have probable cause might suffice. Nevertheless, the Court will explain the reasons for reaching its determination.

The issue in both raids is complicated by the fact that some of the persons participating in the raid were private citizens and, as such, do not come within the terms of § 1445 which only applies to a "sheriff, constable, or other officers of justice."

(1) Jefferson Raid—

There can be no doubt that Officer Flynn, and probably Officer John James of the Pittsburgh Police Department, each had probable cause to believe that persons within the Lovejoy home in Jefferson Borough, Allegheny County, had committed and were committing an offense. Unfortunately for the government's position, the Lovejoy home was not located in Pittsburgh and, therefore, the participation of each in the raid was as a private citizen and not as an "officer of justice".

However, one participant in the raid does qualify under the terms of § 1445. Allegheny County Detective Botula had jurisdiction to arrest anywhere in Allegheny

County and qualified as an "officer of justice" while arresting in Jefferson Borough.

Allegheny County Detective Botula also had probable cause to arrest. While he knew nothing of the surveillance and the investigation before the day of the raid, prior to entering the home to arrest he had been told by Flynn and James the facts which they themselves knew as the result of the prior surveillance and investigation they and their fellow Pittsburgh Police Officers had conducted of the activities in the Lovejoy home and of the persons arrested therein. This knowledge, coupled with Detective Botula's belief that the Pittsburgh officers were reliable informants and the status of the informants as police officers, certainly constitutes probable cause. Additionally, the activities in the home, after the raiders had knocked,[20] provided some corroboration of the facts which had been told Detective Botula, but even without that, he had probable cause to arrest.

(2) Bethel Park Raid—

Again there can be no question but that Leo Flynn, by this time a private citizen but still retaining his contacts in the Pittsburgh Police Department, and William Claney Smith, Esq., Allegheny County Assistant District Attorney, each had probable cause to arrest. However, as the Court interprets § 1445, neither one qualifies as an "officer of justice," and the arrests can be justified only if Constable Hasley or Deputy Constable Hieroni-

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20. The occurrences involved in executing the invalid warrants are discussed more fully in Section IV, *infra*, on the legality of the entrance into the home to arrest.

mus, each of whom had jurisdiction to arrest in Bethel Park, had probable cause to arrest without a warrant. The Court finds that each of them had such probable cause. Deputy Constable Hieronimus was present throughout the time Mr. Flynn and Attorney Smith were telling the facts of the past surveillances, of Smith's discovery of the headquarters and of their background knowledge and information to the Justice of the Peace. While the evidence indicates that Constable Hasley was absent for a short time while the facts were being stated to Justice of the Peace Hubbard, the Court, nevertheless, finds that Constable Hasley heard enough of the factual background to have had probable cause to arrest. Furthermore, Flynn gave the two Constables further information while they were driving to the raid in Flynn's car. This factual information, when coupled with Constable Hasley's belief that the informants were reliable and the knowledge of both constables of the status of one as a former police officer and the other as an Assistant District Attorney, certainly constitutes probable cause to arrest for each of the constables. Additionally, the occurrences in the house[21] tend to corroborate the facts given to the constables and reinforce the existence of probable cause on the part of the two constables, although probable cause existed even without these corroborative occurrences.

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21. These are discussed more fully in the discussion on the method of effectuating the arrests. See Section IV *infra*.

IV. DID THE BREAKING OF THE DOORS OF PRIVATE HOMES VITIATE WHAT WAS OTHERWISE A LAWFUL ARREST?

The answer is "no".

A. *Does breaking doors of a private home in order to arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer in and of itself violate the Fourth Amendment?*
The answer is "no".

Discussion

Defendants rely on two cases in support of their contention that an opposite conclusion is required. Chapman v. United States, 365 U. S. 610 (1961); Nueslein v. District of Columbia, 115 F. 2d 690 (D. C. Cir. 1940). Both cases are distinguishable and reliance on them is misapplied.

B. *Does breaking into a private dwelling to arrest without a warrant for a misdemeanor not committed in the officer's presence violate Pennsylvania law?*

The answer is "no".

Discussion

Since the breaking into the house is part of the arrest process, the effect to be given, in determining the legality of an arrest, to the breaking in is determined by Pennsylvania law so long as Federal Constitutional standards are met.[21] Although some Pennsylvania cases

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21. See the discussion on the applicability of the state law of arrest in the section of this Opinion entitled "General Principles of Law" *supra*.

on this issue have been cited by both parties, no Pennsylvania appellate court appears to have decided the issue before the Court, and the trial court cases do not indicate any consensus of opinion helpful to the Court in determining the applicable Pennsylvania law.[22] The Court considers the question an open one to be determined in the light of reason, common sense, and any legislative intention evident in § 1445.

Applying these criteria to the issue, the Court can only conclude that an arrest without a warrant subsequent to breaking into a private dwelling in order to arrest a person for operating a numbers lottery, even though the offense is not committed in the officer's presence, is legal and valid. To hold otherwise would be to sanction avoidance of the consequences of § 1445 and the other gambling statutes by the simply device of refusing to answer the door not only when the officers are coming to arrest without a warrant under § 1445, but also when officers come to execute a search or arrest warrant.[23]

The Court cannot believe that the appellate courts of Pennsylvania would sanction such a result and be-

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22. Commonwealth v. Truitt, 369 Pa. 72 (1951) (concurring opinion) (*dictum*); Commonwealth v. Manduchi, 58 Lancaster L. Rev. 54 (1962) (search warrant); Commonwealth v. Whitebread, 52 Luzerne 81 (1962); Commonwealth v. Krubeck, 8 Dist. 521 (Quarter Sessions, Philadelphia 1899); Commonwealth *ex rel.*, Volpe v. Superintendent of County Prison, 5 Dist. 635 (Quarter Sessions, Philadelphia 1896).

23. So long as arrests are permitted without warrants, no differentiation based on the existence of a warrant would appear to be valid when the question of permitting breaking of doors is the issue.

lieves that they would hold that breaking in to arrest without a warrant a person for operating a numbers lottery is permissible, even though said offense is not committed in the officer's presence.

C. *Did the specific circumstances of the entry into the two homes violate any federal constitutional standards or in any way violate state law?*

The answer is "no".

Facts

(1) The Jefferson Raid—

Pittsburgh Police Officers Flynn and James and Allegheny County Detective Botula, all three in plain clothes, approached the house and went to the door. The outer door which was a storm door with windows in it was locked. The inner door which was made of solid wood was unlocked and partly open. The officers could see inside and could be seen by those inside the house, when those inside and outside were at the proper angle. The arresting officers knocked on the door of the premises. There was scurrying, running, and commotion in the house. Persons inside yelled, "It's the cops." A minute after the knocking, the three officers broke into the home and arrested those within.

(2) Bethel Park Raid—

The raiding party was composed of Constable Hasley, Deputy Constable Hieronimus, former Pittsburgh Police Officer Leo Flynn and Assistant District Attorney Smith. Internal Revenue Agent Madden was also pres-

ent.[24] The party approached the front door. Constable Hasley knocked. They heard noises—rumbling walking and running around, and the moving of different things around. A cry of "It is the cops" was heard. Meanwhile, Flynn and Hasley had gone to the cellar door. Finding it unlocked, they raised the door and entered the garage, going from there into an adjoining basement. While entering into the basement, they announced their status as police officers and their purpose to arrest.

Discussion

In their briefs, defendants do not contend that the specific method and facts of the entry were unreasonable under the circumstances and thus violate state law or federal constitutional standards. Instead, they appear to rely solely on the contention that an officer may not break doors of a private home to arrest for a misdemeanor. Under these circumstances, the Court could well find, and does find, that this defense to the extent raised during the hearing has been abandoned. Nevertheless, the Court will make a specific finding as to the reasonableness and legality of the method of entry, under all the facts and circumstances of this particular case.

Under the circumstances of each of these raids—Jefferson and Bethel Park—the "officers of Justice," under 18 Pa. Stat. Ann. § 1445, and the private persons assisting them had reason to believe that the persons inside knew the identity and purpose of the officers and

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24. For a fuller discussion of the role played by I. R. S. Agent Madden, see the discussion of the effect of his participation in Section V *infra*.

that if they delayed making their entry the wagering paraphernalia which they clearly had probable cause to believe was inside would be destroyed.

The leading case on the vitiation of an otherwise lawful arrest by the method of entry to arrest is Ker v. California, 374 U. S. 23 (1963), which was a state prosecution wherein the entry having been held legal under the state law by the state courts, the legality of the method of entering the home was then measured by federal constitutional standards of reasonableness.[25] After a meticulous comparison of the facts in this proceeding and the facts in Ker, the Court determines that the method of entry in this proceeding meets the constitutional standards of reasonableness set forth in Ker.

As to the vitiating effects of the method of entry on the legality of the arrest under state law, no cases have been cited to the Court wherein this specific question has been raised. It is the opinion of the Court that, breaking in to arrest without a warrant for operating a numbers lottery being permissible under state law,[26] the courts of Pennsylvania would determine that nothing in the facts of this case would violate Pennsylvania Law and vitiate an otherwise legal arrest.

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25. Federal constitutional rather than statutory standards are applied in federal prosecutions wherein the evidence was seized by state officers. See Elkins v. United States, 364 U. S. 206 (1960).

26. For the discussion of the applicable Pennsylvania law on this point; see discussion in IV (B) of this Opinion.

V. WAS THE PARTICIPATION OF INTERNAL REVENUE SERVICE AGENT MADDEN IN THE BETHEL PARK RAID SUCH AS TO MAKE FEDERAL STATUTORY AS WELL AS CONSTITUTIONAL STANDARDS APPLICABLE TO SAID RAID?

The answer is "no".

Discussion

Defendants rely on the case of Byars v. United States, 273 U. S. 23 (1927), to support their contention that this raid must be deemed a federal raid and that, therefore, federal statutory standards are applicable. The Court in Byars indicated that mere participation in a state search by a federal officer does not render it a federal undertaking and that whether the participation was sufficient to render the state search a federal one depends upon the peculiar facts of each raid.[27]

A comparison of the factual setting in Byars and in the instant case indicates that the two cases are distinguishable and that Byars is inapplicable to this proceeding. In Byars the federal agent not only entered the premises but actually searched a particular room therein and discovered some evidence. In this proceeding, the federal agent was not invited to attend by Mr. Flynn, a private citizen. Refused permission to participate in the raid by his superiors, federal agent Madden was advised that he could go along on the raid as an observer, which he did.

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27. No contention has been made, as none could be, that this state raid was being conducted for the federal government by state officers.

Contrary to the situation in Byars, Internal Revenue Service Agent Madden did not enter the premises nor did he participate in the search. However, he did, by his own admission, work as a guard at the rear door, even though he had no authority to do so and did not claim any compensation of the federal government for his activities on that day or for the twenty-two miles recorded on his personal automobile during that time.[28] Under all the facts and circumstances, the Court is of the opinion that the participation of Internal Revenue Service Agent Madden in the Bethel Park Raid did not make the raid a federal, or a joint federal and state raid, but that the raid remained a state raid, and that, therefore, federal statutory standards are inapplicable.

Furthermore, if Byars is read as requiring participation in the search, rather than merely in the raid, by the federal agent in order that the full panoply of federal law be applicable, then this proceeding is clearly distinguishable from Byars on the facts, since there is no doubt in the Court's mind that Agent Madden did not participate in the search.

While the Court does not so read Byars, said case might also be read as making the test of the applicability of the full panoply of federal law to be whether the participation of the agent in the search was under color of his federal office. Even if such were the test, federal statutory law, more particularly 13 U. S. C. A. § 3109, on

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28. The entry in Agent Madden's diary for that date reads, "Worked with Leo Flynn and W. C. Smith as an observer in raid at Betz, 110 Criss St., Bethel Park. I worked as guard at rear door—did not enter house. 2 hours worked. No compensation time claimed. Mileage of 22 miles not claimed."

which defendants rely, is not applicable in this proceeding. After due consideration of all the facts and circumstances of the raid and of the role of Agent Madden in it, the Court finds as a fact that said agent did not participate in the raid under color of his federal office.

For all of these reasons, the Court concludes that federal statutory standards were not applicable to the raid.

VI. CONCLUSION.

Federal statutory standards being inapplicable to each of the two raids, and the Court concluding that, under state law and federal constitutional law, the searches and seizures in each of the raids were reasonable under all the facts and circumstances and were legal and valid as incident to a lawful arrest based on probable cause, it is the considered opinion of the Court that in regard to the items of evidence described in Paragraphs 3 and 25 of Defendants' Motion for Suppression of Evidence, said Motion should be denied.

Statements of fact and conclusions of law contained within this Opinion are adopted as Findings of Fact and Conclusions of Law.

An appropriate Order is entered.

Appendix B.

ORDER.

NOW, THEREFORE, THIS 9th day of January, 1964, Defendants' Motion for Suppression of Evidence described in Paragraphs 3 and 25 of said Motion will be and hereby is denied.

The within proceeding is fixed for trial to commence February 3, 1964, and no continuances will be granted under any circumstances.

/S/ WALLACE S. GOURLEY, CDJ
Chief Judge

Appendix B.

Opinion on Motion to Dismiss Indictment.

(Filed January 9, 1964.)

In this criminal proceeding, defendants have filed a Motion to Dismiss Indictment, Motion for Suppression of Evidence and Motion for Bill of Particulars Ancillary to Motion to Suppress. By prior Order of Court, by agreement and stipulation of the parties, approved by the Court, and by Opinion and Order entered contemporaneously herewith this Opinion and Order, the Court has disposed of the Motions for Suppression of Evidence and for Bill of Particulars Ancillary to Motion to Suppress. It is the considered opinion of the Court that the Motion to Dismiss Indictment should be denied.

Defendants contend that each count of the indictment should be dismissed on the grounds that evidence which is the basis for the indictment was procured illegally. This contention has no merit. The Court has determined that the evidence described in Paragraphs 1, 3, 10, 15, 20, 21, 23, 24 and 25 of defendants' Motion for Suppression of Evidence was legally seized and defendants have withdrawn said Motion as to those items enumerated in Paragraphs 2, 6, 7, 11, 19 and 22 of said Motion. Certainly, any count of the indictment whose basis was the evidence enumerated in any of said Paragraphs of the Motion for Suppression is not open to attack on the ground of being based on illegally obtained evidence. As to the counts of the indictment based on the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 of said Motion for Suppression of Evidence, which the government, without conceding such evidence was obtained as a result of an illegal search and seizure, has agreed not to introduce

into evidence, it is the opinion of the Court that basing a count of an indictment on illegally obtained evidence is akin to basing such count on hearsay, which clearly is permissible. See Costello v. United States, 350 U. S. 359 (1956). Therefore, even if the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 were illegally obtained, a question which the Court expressly does not determine, the use of such illegally obtained evidence is irrelevant where the issue facing the Court is whether a count of an indictment should be dismissed.

Defendants also contend that Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination, in that such payment would have tended to incriminate the defendants under both federal and state statutes.

In the opinion of the Court the legal issues raised by this contention are of no merit, having, in effect, already been determined adversely to defendants' position by the Court of Appeals. See United States v. Joseph, 278 F. 2d 504 (3rd Cir. 1960); cf. Lewis v. United States, 348 U. S. 419 (1955); United States v. Kahringer, 345 U. S. 22 (1953).

Conclusion

Since neither of defendants' arguments for dismissing the indictment is meritorious, the Motion to Dismiss Indictment should be denied.

An appropriate Order is entered.

ORDER.

AND NOW, THEREFORE, THIS 9th day of January, 1964, defendants' Motion to Dismiss Indictment will be and hereby is denied.

/S/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gustave Diamond, Esq.
United States Attorney

James E. McLaughlin, Esq., for Anthony Grosso,
606 Frick Building

Vincent J. Fuller, Esq., for Samuel Grosso,
1000 Hill Building
Washington 6, D. C.

Thomas A. Wadden, Esq., for Jennie Gross and Joseph Pino
1000 Hill Building
Washington 6, D. C.

Judgment of the District Court

The sentence of the Court, imposed 3/9/64, is that the deft. Anthony M. Grosso be imprisoned for one year and pay fine of $1,000.00; that he be further imprisoned until payment of fine as to Ct. 1, Ct. 2: One year and pay fine of $10,000.00 together with costs; stay imprisonment until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 1. Ct. 3: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutive with sentence imposed at Ct. 2. Ct. 4: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 6; One year imprisonment and pay fine of $10,000.00 with costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 7: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 3. Ct. 8: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 9: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with imprisonment imposed at Ct. 2. Ct. 10: One year and pay $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 11: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 12: One

year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 13: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 14: One year and pay fine of 10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run consecutively with sentence imposed at Ct. 7. Ct. 15: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 16: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 17: One year and $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed Ct. 2. Ct. 20: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 14. Ct. 21: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 20 Ct. 22: One year, pay $10,000.00 fine and costs; stay imprisoned until paid. Imp. to run consecutively with sent. imposed at Ct. 21. Ct. 23: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imp. to run consecutively with sentence imposed at Ct. 22.

Total imprisonment is nine (9) years and the total fine is $191,000.00 (Foley, J.).

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA,
Appellee,
v.
ANTHONY M. GROSSO,
Appellant.

APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 20, 1965

Before McLAUGHLIN, STALEY and SMITH, *Circuit Judges.*

Opinion of the Court

(Filed March 25, 1966)

By SMITH, *Circuit Judge.*

The appellant was tried by a jury and convicted on twenty counts of an indictment charging violations of the Gambling Tax Act of 1954 as amended, 26 U.S.C.A., §§ 4401 and 4411, and related provisions of § 7203 of the same title. On each of said counts he was fined $10,000 and sentenced to a term of imprisonment of one year. He was convicted also on a single count charging conspiracy to defraud the United States, 18 U.S.C.A., § 371, and was thereon fined $1,000 and sentenced to a term

of imprisonment of one year. It was ordered that nine terms of imprisonment were to run consecutively and the others were to run concurrently with the term of imprisonment imposed on count 2. The present appeal is from the judgment entered on this verdict.

The appellant raises several questions, the most important of which is the following: whether, in the absence of both defendant and his counsel, and without notice, the substantial rights of the defendant were abridged by the action of the trial judge when, in response to an unrecorded note from the jury, he transmitted his reply, through the bailiff, without recalling the jury to the courtroom. The question is troublesome because of the wholly inadequate and badly confused record from which it is impossible to accurately reconstruct the incidents giving rise to the situation. We should add that the briefs on the question leave much to be desired.

After a trial which consumed more than four weeks, the instant case was submitted to the jury at approximately 4:15 P.M., on Wednesday, March 4, 1964. Thereafter deliberations continued until 11 P.M., when the jurors retired for the night. The following morning, at approximately 11:30 A.M., shortly after deliberations had been resumed, the jury sent a note to the judge purportedly indicating their inability to reach a verdict. Without notice to the appellant or his counsel, and in their absence, the judge instructed the jury, through the medium of the bailiff, to continue its deliberations. There was no record made of either the contents of the note[1]

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1 The note was lost but it appears from the record that its content was similar to that of a second note, to which reference is made in the body of the opinion.

or the substance of the judge's response. Although informed of the occurrence shortly afterward, counsel for the appellant interposed no objection and failed to request corrective action by the Court.

It was obvious error for the trial judge to instruct the jury, in the absence of the appellant and his counsel, without notice to them. Shields v. United States, 273 U.S. 583, 588 (1927); United States v. Neal, 320 F. 2d 533, 536 (3rd Cir. 1963); Jones v. United States, 308 F. 2d 307, 311 (D.C. Cir. 1962); Evans v. United States, 284 F. 2d 393, 394 (6th Cir. 1960). It was likewise error to convey these instructions to the jury through the medium of the bailiff. Henderson v. United States, 204 F. 2d 126 (6th Cir. 1953); Wheaton v. United States, 133 F. 2d 522, 526 (8th Cir. 1943). These errors do not warrant reversal in the absence of prejudice to the substantial rights of the appellant.

However, if appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. United States v. Woodner, 317 F. 2d 649, 651 (2nd Cir. 1963), cert. den. 375 U.S. 903; United States v. Agueci, 310 F. 2d 817, 840 (2nd Cir. 1962), cert. den. 372 U.S. 959; United States v. Williams, 271 F. 2d 434, 437 (7th Cir. 1959), cert. den. 361 U.S. 961. He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create. United States v. Agueci, *supra*.

Although not required to do so, we are empowered to consider the alleged errors on the merits if they af-

fected the "substantial rights" of the appellant. FED. RULES CR. PROC., rule 52(b), 18 U.S.C.A.; United States v. Provenzano, 334 F. 2d 678, 690 (3rd Cir. 1964), cert. den. 379 U.S. 947; Ramsey v. United States, 332 F.2d 877 (8th Cir. 1964); United States v. Vasen, 222 F. 2d 3, 5, 6 (7th Cir. 1955), cert. den. 350 U.S. 854; United States v. Jones, 204 F. 2d 745, 749 (7th Cir. 1953), cert. den. 346 U.S. 844. The power is discretionary and should be exercised only in those situations in which the failure to do so would result in a manifest miscarriage of justice. *Ibid.* We do not have such a situation in the instant case.

We find upon our review of the record that the evidence as to the appellant's guilt was overwhelming and that therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict. We are of the opinion that under the circumstances reversal on the ground urged is not warranted. Walker v. United States, 322 F. 2d 434, 436 (D.C. Cir. 1953), cert. den. 375 U.S. 976; United States v. Compagna, 146 F.2d 524, 528 (2nd Cir. 1944), cert. den. 324 U.S. 867. The case of United States v. Neal, *supra,* upon which the appellant relies, is distinguishable from the case now before us.

Following the above described incident the jury continued deliberations until 10:50 P.M. Shortly thereafter the bailiff in charge reported to the Court that one of the female jurors had been injured and that another had become ill. We are here concerned only with the ill juror. After she was given medical attention the physician reported to the judge by telephone that she was suffering from a nervous disorder, the exact nature of which is

not disclosed by the record. This information was imparted to defense counsel, who had been summoned to the judge's chambers by a deputy marshal. The physician's report was apparently never reduced to writing; in any event, its content was not made a part of the record. The juror was again examined by the physician on the following morning. It would appear that the results of this examination were reported to the Court but were likewise not incorporated into the record.

Counsel for the parties met with the trial judge in his chambers on the morning of Friday, March 6, 1964, at which time they were informed that the juror was still ill but that the jury would be able to resume deliberations later in the day. Defense counsel objected to the resumption of deliberations and moved for a mistrial and the discharge of the jury. He argued that because of the illness of the juror, further deliberations might result "in some sort of a compromise verdict." The motion was denied and jury deliberations were suspended until the following day.

On the morning of Saturday, March 7, the juror was again examined by the physician, who reported to the deputy marshal that she was still ill. However, the condition of the juror was apparently such that the jury was able to resume deliberations at 2:45 P.M. Shortly thereafter the information which the deputy marshal had received from the physician was transmitted to the trial judge in the presence of counsel. Defense counsel again renewed his motion for a mistrial and the discharge of the jury on the grounds urged earlier. The motion was denied. The trial judge then asked

counsel if they would consider stipulating "that [the] case could continue * * * with a jury of eleven." Defense counsel refused to so stipulate.

While counsel for the respective parties were in conference with the judge in chambers, the judge received a second note from the jury reading as follows:

> "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

Again the trial judge failed to recall the jurors to the courtroom. He stated to counsel: "We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working." Defense counsel interposed no objection to the proposed action of the trial judge and made no request that the jury be recalled to the courtroom for further instructions. The bailiff was instructed to tell the jurors, "I have got their message and I suggest they keep on working." We assume that this message was conveyed to the jury, which continued its deliberations for approximately five hours. A verdict was returned at 8:30 P.M., and thereafter, at the request of defense counsel, the jurors were polled and each assented to the verdict as reported by the foreman.

When the jury returned its verdict the physician who had examined the ill juror was available in the

courtroom and this was made known to the Court. Defense counsel requested that the physician be permitted to make his report; this occurred at 9:30 P.M. The Court denied the request stating, "I am not going to bring that up here at this time at all." However, it must be noted that on the previous day the trial judge advised defense counsel that in the event of conviction he could offer testimony of the physician in support of a motion for a new trial. This motion was made in due course but neither the report of the physician nor his testimony was offered in support of it. It is reasonable to assume that the failure of defense counsel to produce this evidence was prompted by his deliberate choice.

The appellant challenges the verdict as void on the ground that it was the product of judicial coercion. He argues that under the circumstances of this case the prolonged confinement of the jury, coupled with the illness of the juror constituted duress. We do not agree.

The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion. De Vault v. United States, 338 F.2d 179, 182 (10th Cir. 1964); Mills v. Tinsley, 314 F.2d 311, 313 (10th Cir. 1963), cert. den. 374 U.S. 847; United States v. Minieri, 303 F. 2d 550, 556 (2nd Cir. 1962), cert. den. 371 U.S. 847, and the cases therein cited. However, it has been held that such action, when accompanied by other circumstances, may be coercive. See United States v. Pleva, 66 F. 2d 529 (2nd Cir. 1933). The illness of a juror may be regarded as such a circumstance, but only where

it appears from the evidence that the verdict was induced by the juror's condition. *Id.* There is no such evidence in this case.

Against these critical omissions by the appellant stands the fact the jury was polled after it returned its verdict. The object of a jury poll is "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the Court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that *no juror has been coerced or induced to agree to a verdict* to which he has not fully assented." *Miranda v. United States*, 255 F. 2d 9, 16 (1st Cir. 1958). (Emphasis added). *Humphries v. District of Columbia*, 174 U.S. 190, 194. Since each of the jurors assented to the verdict as reported by the foreman the verdict should not be set aside in the absence of some proof that coercion in fact existed. Contrary to the appellant's contention, the facts of the case do not speak for themselves.

There are several other questions raised on this appeal. These questions relate to: the admission of certain exhibits allegedly procured as a result of illegal searches and seizures; the denial of a motion to dismiss the indictment made prior to trial; the legality of the sentences; and, the constitutionality of § 4401 of Title 26 U.S.C.A. It is necessary that these questions be treated separately.

Admission of Testimony

The exhibits in question were seized in searches conducted at various places at different times. Prior to trial these exhibits were made the subject of a motion

to suppress evidence filed by the appellant and three other defendants under rule 41(e) of Fed. Rules Cr. Proc., 18 U.S.C.A. This motion was denied, United States v. Grosso, 225 F. Supp. 161. A separate trial was granted the appellant on his motion for a severance filed under rule 14 of Fed. Rules Cr. Proc., 18 U.S.C.A. The arguments of the defendant relating to the admissibility of the exhibits will be separately discussed.

A

It appears from the testimony of one Hannan, corroborated by his wife, that he was engaged in the operation of a numbers lottery and, between August of 1957 and April of 1961, was operating under an agreement to "lay off" his daily wagers with the appellant in return for a commission and a share of the profits. The relationship of the defendant to Hannan was that of a "banker." On April 27, 1960, special agents of the Internal Revenue Service, armed with a search warrant, raided the Hannan home, where they seized a notebook containing a daily record of Hannan's business and his transactions with the appellant. This notebook was a significant item of proof in the government's case.

At the trial Hannan was called as a witness and he testified at length as to the nature and extent of his daily business with appellant. During his testimony the notebook was produced, identified by him as his personal record, and offered in evidence. The appellant interposed no objection to the testimony which preceded the offer but objected to the admission of the notebook on the ground that its seizure was illegal. The arguments advanced in support of the objection were confusing and

difficult to follow. The objection was overruled and the exhibit was received.

The appellant here contends that: the search warrent was void; it was unlawfully executed; and, the special agent lacked authority to execute it. We find it unnecessary to consider these contentions, here raised for the first time.

It clearly appears from the undisputed evidence in the record that the premises searched were owned and occupied by Hannan and that the notebook seized was a personal record kept by him in the operation of his illegal business. The person against whom the search was directed was Hannan. There is nothing in the record to show that the appellant had the requisite legal interest in either the premises or the notebook and at no time did he claim such an interest. The appellant, relying on Jones v. United States, 362 U.S. 257 (1960), maintains that he was not required to establish such an interest as a condition precedent to his right to challenge the constitutionality of the search and seizure. This reliance is misplaced and demonstrates the penchant of defense counsel for misreading cases.

The defendant in the Jones case was tried and convicted on each of two counts of an indictment charging violations of federal narcotics laws. The first count charged him with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U.S.C.A. § 4704(a). The second count charged him with having "facilitated the concealment and sale of" narcotics, knowing the same to have been imported illegally, in violation of 21 U.S.C.A., § 174. In a prosecution under either of these statutes the conviction of the accused

may rest solely on proof of possession. It is obvious that in such a prosecution an accused may not assert a a possessory interest in the property seized without admitting his guilt.

The Court held that under such circumstances a defendant may raise the constitutional question without alleging or establishing, as a condition precedent, the requisite legal interest in the premises searched or the property seized. See Contreras v. United States, 291 F. 2d 63 (9th Cir. 1961). The Court held further that an accused is a "person aggrieved by an unlawful search and seizure" within the meaning of rule 41(e), *supra*, if his conviction on the criminal charge made against him may be based solely upon proof of possession.

The appellant's interpretation of the *Jones* decision, if adopted, would completely vitiate the requirement of "standing." This was clearly not the intention of the Supreme Court. The Court held, consistently with earlier decisions, at page 261: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*" (Emphasis supplied). The Court then stated, "Ordinarily, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

As we interpret the decision, the Court confirmed the general rule but created an exception applicable only in a limited class of cases, those cases in which an accused has a choice of asserting an interest in the property, thus admitting guilt, or foregoing his right to challenge the constitutionality of the search and seizure. We are of the opinion, and so hold, that the facts in the instant case do not bring it within the exception. See United States v. Konigsberg, 336 F. 2d 844, 847 (3rd Cir. 1964), cert. den. sub nom. 379 U.S. 930. The appellant herein was tried and convicted of a number of offenses, none of which involved the element of possession.

We have considered the other grounds urged in support of the defendant's claim to standing but find them equally without merit.

B

In the search of the premises of one Lovejoy, located in Bethel Park, Mt. Lebanon Township, local police officials seized "two black books" which apparently contained some evidence as to the operations of a numbers lottery. The circumstances under which the search and seizure were made are set out in detail in the opinion of the District Court, *supra*. On the motion to suppress the evidence it was contended that the search and seizure violated the constitutional rights of the defendants, including those of the appellant. The contention was dismissed as without merit. The appellant here argues that the decision of the court below was erroneous. We do not agree. However, we find it unnecessary to consider the constitutional issue because of the circumstances under which the evidence was offered and received at the trial.

Prior to trial the district attorney represented to the Court that the evidence seized in the search of the Lovejoy premises would not be offered. The evidence was not offered in the government's direct case. The appellant took the stand in his own defense and, under examination by his counsel, not only denied his complicity in the offenses with which he was charged but also testified affirmatively that he had in no way been connected with the operations of a numbers lottery since late in 1950. He further testified that since that time he had been engaged in nothing but legitimate business enterprises.

In rebuttal the government introduced the testimony of a local police official who indentified the books as having been seized in the search of the Lovejoy premises. He testified as to efforts made by the appellant to obtain possession of the books by bribery. The evidence, including the books, was offered for the limited purpose of refuting the appellant's sweeping claim that he had not been engaged in the numbers lottery since 1950. The jury was carefully and properly so instructed.

The appellant argues here, as he did in the court below, that receipt of the evidence was precluded by the government's pretrial representation that it would not be used. We cannot agree. Any advantage that the appellant could have derived from the representation was waived when he testified, under direct examination by his own counsel, that he had not been engaged in the numbers lottery since late in 1950. Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged. The case of Walder v. United States, 347 U.S. 62 (1954), although factually distinguishable, clearly supports this result.

In the *Walder* case it was stated at page 65:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .
>
> "Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the *sweeping claim that he had never dealt in or possessed any narcotics.* Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Emphasis supplied).

C

A search of the premises of one Betts, located in Jefferson Borough, resulted in the seizure of certain evidence, the nature of which is not disclosed. The appellant concedes that this evidence was neither offered nor received at the trial but contends only that it was improperly used in the computation of his tax liability for cer-

tain periods covered by the respective counts of the indictment. We find nothing in the record to support the contention that the evidence was so used; in fact, the undisputed testimony is clearly to the contrary. Therefore we find it unnecessary to consider the appellant's attack on the constitutionality of the search.

D

During an investigation of gambling in the area of Pittsburgh, local police officials obtained information that the Calvary Cemetery was being used as a "numbers drop," an exchange point at which lottery wagers were delivered surreptitiously to the representatives of the "bank." On November 27, 1959, while the cemetery was under surveillance, the police observed one Petraglia arrive on the scene in a blue Chevrolet. Shortly thereafter other vehicles arrived and their occupants[2] were observed depositing envelopes and brown paper bags in the Petraglia car. The police knew from experience and their earlier investigation that this was a customary method of delivery employed by numbers operators. They moved in, arrested Petraglia, immediately searched his car and found the envelopes and bags containing thousands of lottery slips. The arrest and search were made without a warrant.

It clearly appears from the undisputed evidence, which we find unnecessary to summarize, that the police had reasonable grounds and probable cause to believe that Petraglia and others they observed on the scene

2. As a result of earlier investigations these persons were known to the police as "runners" or numbers operators.

were engaged in the operation of a lottery in violation of Pennsylvania law. This seems to be conceded by the defendant. However, he argues that the absence of a warrant rendered unlawful the arrest and the search which followed. We cannot agree. The urgency of the situation which confronted the police was sufficient to excuse their failure to obtain a warrant. Draper v. United States, 358 U.S. 307 (1959); United States v. Rabinowitz, 339 U.S. 56 (1950). Petraglia was in a moving vehicle apparently ready to flee as the police approached; in fact, his flight and that of one Berkowitz, who was in another car, was prevented when the police blocked the roadway with their vehicles. The case of McDonald v. United States, 335 U.S. 451 (1948), on which the defendant relies, is distinguishable on it facts and therefore inapposite.

Assuming the illegality of the search, we find the appellant lacked the standing to challenge it. Jones v. United States, supra; United States v. Konigsberg, supra. In his pretrial motion to suppress the evidence he neither alleged nor established the requisite interest in either the automobile searched or the property seized. At the trial of the action the appellant was in no better position to object to the admission of the evidence.

DENIAL OF MOTION TO DISMISS INDICTMENT

Pursuant to rule 12(b)(2) of the Fed. Rules Cr. Proc., 18 U.S.C.A., the appellant moved for dismissal of the indictment on the ground that it was predicated at least in part on illegally seized evidence. The denial of this motion is urged as a ground for reversal. It is well established that an indictment is not open to challenge on the ground that the evidence presented to the grand

jury was either inadequate or incompetent. Lawn v. United States, 355 U.S. 339, 349, 350 (1958); Costello v. United States, 350 U.S. 359, 363, 364 (1956); United States v. Labate, 270 F.2d 122 (3rd Cir. 1959), cert. den. 361 U.S. 900; Coppedge v. United States, 311 F. 2d 128, 132 (D.C. Cir. 1962), reversed on other grounds 369 U.S. 438; United States v. Aviles, 274 F. 2d 179, 191 (2nd Cir. 1960).

ALLEGED ILLEGALITY OF SENTENCES

The appellant contends that the trial judge erred in imposing a separate sentence on each of fifteen counts charging him with the failure to pay the excise taxes due for specified monthly periods. This contention was held by this Court to be without merit in the case of United States v. Minker, 312 F. 2d 632, 636 (1962), cert. den. 372 U.S. 953, which is not mentioned in either brief.

CONSTITUTIONALITY OF STATUTE

The appellant challenges the constitutionality of § 4401 of Title 26 U.S.C.A., under which a tax is imposed on wagers as defined in § 4421 of the same title. He argues that the requirement that he file a tax return stating the gross amount of the wagers received violates his constitutional privilege against self-incrimination. This argument is predicated on an alleged possibility of exposure to prosecution under local law. We have found no regulation under which such returns may be made available to local police and there is no evidence in the record that they are. The only public record available for inspection is an alphabetical list of the names of all persons who have paid special taxes under the Gambling Tax Act, *supra*. 26 U.S.C.A. § 6107.

Appendix B.

A constitutional issue similar to that raised here was considered and decided by the Supreme Court in Lewis v. United States, 348 U.S. 419, 422 (1955). The issue was disposed of on the following basis:

> "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

This rationale is applicable here. See United States v. Costello, 352 F. 2d 848, 851 (2nd Cir. 1965).

The imposition of a tax on wagers was a valid exercise of the federal taxing power. United States v. Kahriger, 345 U.S. 22, 31, 32 (1953); see also Lewis v. United States, *supra*. When the appellant voluntarily elected to engage in the business of accepting wagers he was required to pay the occupational tax imposed by § 4411 and the excise taxes imposed by § 4401. The requirement that he file a return was intimately related to the collection of the latter taxes and is therefore supportable as a proper enforcement measure. Under the

rationale of the Lewis case, the possibility "of incrimination for future or even past acts, however great, is irrelevant . . ." United States v. Costello, *supra.*

If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return. See United States v. Sullivan, 274 U.S. 259, 263 (1927). The appellant may not refuse to pay the excise taxes lawfully due and then claim immunity from prosecution for this refusal on the ground that the requirement of a return per se violates his privilege. *Id.* at 264. Since he failed to file the returns "it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for." United States v. Kahriger, *supra;* Lewis v. United States, *supra,* at 33.

An argument similar to the one made here was advanced in United States v. Joseph, 278 F. 2d 504 (3rd Cir. 1960), cert. den. 364 U.S. 823, and was therein held to be without merit.

The judgment of the court below will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA
v.
ANTHONY M. GROSSO, SAMUEL J. GROSSO,
JENNIE B. GROSSO, JOSEPH PINO
ANTHONY M. GROSSO, Appellant

(D.C. Criminal No. 62-281)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, STALEY and SMITH, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 10, 1964, be, and the same is hereby affirmed.

ATTEST:
IDA O. CRESKOFF
Clerk

March 25, 1966

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant

Sur Petition for Rehearing

Present: STALEY, Chief Judge, MCLAUGHLIN, KALODNER, HASTIE GANEY, SMITH and FREEDMAN*, *Circuit Judges.*

The petition for rehearing filed by ANTHONY *M.* GROSSO in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
WILLIAM F. SMITH
Judge

Dated: May 3, 1966

*Judge Freedman would grant rehearing.